IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 7, 2009 Session

DILLARD SMITH CONSTRUCTION COMPANY v. COMMISSIONER OF LABOR AND WORKFORCE DEVELOPMENT

Appeal from the Chancery Court for Davidson County
No. 06-2755-III Ellen H. Lyle, Chancellor

No. M2008-00735-COA-R3-CV - Filed December 15, 2009

This appeal arises from a petition seeking judicial review of an administrative order. The Tennessee Department of Labor, Division of Occupational Safety and Health (TOSHA) cited Dillard Smith Construction Company for violating six safety regulations that related to the fatality of a Dillard Smith apprentice-lineman. The TOSHA Review Commission affirmed all six violations. The Chancery Court subsequently affirmed the Review Commission's findings as to five of the six violations but reversed one, concluding that the record did not support the finding that Dillard Smith failed to conduct a job briefing. Both parties appealed the Chancellor's rulings. The Commissioner contends that the Chancellor erred in reversing the finding that Dillard Smith failed to conduct the required job briefing. Dillard Smith contends that the Chancellor erred in affirming the other five violations – that it failed to check conditions related to safety, its employee came into contact with an energized part, the cut-off switch was not opened, the line was not tested, and the line was not grounded. We have concluded that the record contains substantial and material evidence to support the Review Commission's finding that Dillard Smith violated the TOSHA regulation that required a job briefing before beginning the first job of the day; therefore, we reverse the Chancellor's ruling that it did not. We have also concluded that the record contains substantial and material evidence to support the Review Commission's findings that Dillard Smith was also in violation of the other five TOSHA regulations for which it was cited. Therefore, we reverse in part and affirm in part.

Tenn. R. App. P. 3 Appeal as of right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J. joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Sara F. Reynolds, Nashville, Tennessee; Robert G. Lian, Jr., and Paul E. Mirengoff, Washington, D.C., for the appellant, Dillard Smith Construction Company.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Warren A. Jasper, Senior Counsel, for the appellee, Commissioner of Labor and Workforce Development.

OPINION

The alleged violations at issue occurred on the morning of February 19, 2004 at which time Dillard Smith Construction Co. ("Dillard Smith") was working for the Powell Valley Electric Cooperative ("PVEC") to repair numerous electrical lines damaged by a severe winter storm. The storm damage, which included fallen trees and downed power lines, caused extensive problems to the power distribution line network of PVEC and resulted in power outages throughout the network.

Dillard Smith, who was under contract with PVEC to provide for line construction and maintenance services, was called upon by PVEC to provide additional crews to expedite the repairs necessitated by the widespread outages. Dillard Smith assigned several crews to the area, including the two-man crew of Journeyman/Lead-lineman Michael Jones and Apprentice-linemen Samuel Cameron. Jones served as the Acting Foreman. PVEC Lineman Kyle Gibson was assigned to Jones's crew to act as "bird dog." In his capacity as the bird dog, Gibson was to lead the crew to the areas where power outages and downed lines had been reported.[1] Employees of Wolf Tree Service also assisted the crew; they were responsible for getting downed trees off the power lines so the lines could be pulled up and spliced back together.[2]

Gibson, Jones, and Cameron, along with employees of Wolf Tree Service, started working together on February 16, 2004, to repair the extensive storm damage in the area.[3] On the fourth day, February 19, 2004, Jones and Cameron traveled in Jones's truck to meet Gibson at the PVEC facility in Sneedville, as they had done each of the previous days. As customary, Gibson led Jones, Cameron and the Wolf Service employees to the first job of the day. On this particular day, Jones and Cameron rode together in the Dillard Smith truck with Charles Marsee, one of the Wolf Tree Service

[1] It was the responsibility of the bird dog to communicate with PVEC's dispatch office, receive information concerning outages, request and receive information concerning line status, and make requests for lines to be de-energized.

[2] The storm damage repair work typically involved pulling broken power lines back up and splicing them together. Upon arriving at a new jobsite, Jones, Cameron, and Gibson would assess the damage and determine what repair work was needed. Next, Jones or Cameron would test the lines for voltage using a "tick tracer," a small battery-powered device that is attached to a hotstick and held close to the line in question. The tick tracer makes a "ticking" sound if voltage is detected. Jones and Cameron would then proceed with the repair work, wearing appropriate personal protective equipment and using installed grounds as needed. Depending on the nature of the repairs, Gibson would assist Jones and Cameron or leave to search for additional breaks in the line.

[3] Each morning, Jones and Cameron would meet Gibson at the PVEC facility in Sneedville, Tennessee. Gibson would get the information on the crew's first job of the day and lead Jones and Cameron to the jobsite.

employees, and Gibson rode in his PVEC truck with the other two Wolf Tree Service employees, Ray Dillman and Scott Welch.[4]

After the crew finished the first job of the day, the crew got in their respective trucks and Gibson led them to the next job site, which was pole Z-78R2 on Singleton Road. Upon arrival at pole Z-78R2, Gibson exited his vehicle and approached Jones, who was still in his vehicle to request that Jones drive further up the line to check the "tap line," a line that ran off the distribution line. The purpose of checking the "tap line" was to ensure that no sources of power were feeding into the distribution line that could pose a danger to the crew. Before Jones drove off, Cameron exited the vehicle and gathered his climbing gear and tools. As Jones drove up, he noticed Cameron was already working on the pole in an attempt to repair the line and that Gibson was on the ground assisting Cameron. Although Jones had not checked to see if the line Cameron was working on was de-energized, he did not instruct Cameron to stop work when he drove up. Instead, when Jones stopped and stepped out of his truck, he responded to Gibson's request that Jones bring a hoist from the truck to give to Cameron. As Jones was in the process of handing the hoist to Gibson so that Gibson could give it to Cameron, Cameron came in contact with a line on pole Z-78R2 that was energized. As a consequence of coming into contact with the energized line, Cameron died.

The next day TOSHA inspector Arlen Easley inspected the site. Following the inspection he issued a citation to Dillard Smith for six violations of TOSHA regulations:

> Item 1 – 29 C.F.R. 1910.269(a)(3) – Before work on the lines began, conditions related to the safety of the work, such as the voltage of the line and location of power line circuits, were not determined.
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> Item 2 – 29 C.F.R. 1910.269(c)(1) – A job briefing was not conducted before the work began at pole No. Z-78R2.
>
> Item 3 – 29 C.F.R. 1910.269(l)(2) – An employee approached and/or took a conductive object too close to an exposed energized part.
>
> Item 4 – 29 C.F.R. 1910.269(m)(3)(iii) – The cut-off for pole No. Z-78R2 was not opened.
>
> Item 5 – 29 C.F.R. 1910.269(m)(3)(v) – The line for pole No. Z-78R2 was not tested to ensure [sic] it was de-energized.

[4]Gibson testified in his deposition and at trial that on the day of the accident, the crew took an additional truck because Scott Welch had been added to the crew to assist the crew in clearing trees at the first job site; however, in the Joint Stipulation of Facts, the parties agreed that Jones, Cameron, and Marsee were in one truck and Gibson, Dillman, and Welch were in another truck.

Item 6 – 29 C.F.R. 1910.269(m)(3)(vi) – The line for pole No. Z-78R2 was not grounded.

A $7,000 penalty was imposed for each violation, amounting to a penalty of $42,000.[5] Dillard Smith contested the citations and penalties before the Occupational Safety and Health Review Commission ("Review Commission"). After a November 17, 2005 hearing and post-hearing briefing by the parties, the Review Commission issued its Final Order on September 20, 2006, upholding all six citations and penalties.

Dillard Smith then filed its petition with the Chancery Court of Davidson County seeking judicial review of the Review Commission's administrative order. The basis of that appeal, the first of two filed with the Chancery Court, was that the Review Commission failed to provide findings of facts and conclusions of law in the Final Order as required by Tenn. Code Ann. § 4-5-314(c). The Chancellor agreed and issued an Agreed Order remanding the case to the Review Commission to make the required findings of facts and conclusions of law. On June 11, 2007, the Review Commission complied with that order by making the following relevant findings of fact:

> 2. On all points pertinent to this decision, the testimony of Powell Valley Electric Cooperative Lineman Kyle Gibson is credited over the testimony of Dillard Smith's Foreman, Mike Jones;
>
> 3. When the crew arrived at pole Z-78R2 to conduct the storm damage repair on the morning of February 19, 2004, they assumed that the line was not energized;
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> * * *
>
> 5. Prior to Mike Jones leaving the site to check the tap line, 5th-stage apprentice Sam Cameron took his climbing equipment and work tools out of the Dillard Smith truck for the purpose of climbing pole Z-78R2 and commencing the repair work to be done. Although Mike Jones claims that he thought no repair work would begin until he returned from checking the tap line the Review Commission does not find this claim to be credible. The Review Commission believes that Mike Jones knew full well that Sam Cameron and Kyle Gibson had every intention of starting the repair work while he (Mike Jones) checked the tap line;

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[5] The Occupational Safety and Health Act of 1972, which is promulgated under Tennessee law at § 50-3-101 et seq., gives the Tennessee Occupational Safety and Health Commissioner the power to assess penalties. Specifically, Tenn. Code Ann. § 50-3-403 provides as follows:

> If an employer knows or has reason to know that an employment condition or practice in the employer's business seriously endangers the health or safety of the employer's employees, and if the condition or practice is not in compliance with any standard promulgated pursuant to this chapter, a penalty of up to seven thousand dollars ($7,000) shall be assessed for each violation.

6. No one took any action to determine whether the power line at pole Z-78R2 was energized prior to Sam Cameron climbing the pole and beginning the repair work;

7. Mike Jones had no intention of conducting a job briefing prior to Sam Cameron starting the repair work; and

8. Dillard Smith's safety program is not effective in practice.

Based upon the above findings, the Review Commission held that item 1 (existing conditions not determined) and item 2 (no job briefing) were supported by the fact that it was undisputed that no one did anything to determine whether or not the power lines at pole Z-78R2 were energized and that no job briefing occurred prior to Cameron starting the repair work. The Review Commission discredited Jones's testimony that he intended to conduct a job briefing when he returned from checking the tap line. As to items 3 - 6 (employee came into contact with an energized part; the cut-off switch was not opened; the line was not tested; and the line was not grounded), the Review Commission held that because Jones "did not conduct nor intend to conduct a job briefing prior to Sam Cameron performing the repair work . . . the knowledge of the remaining violations are imputed to Mike Jones, and through him to [Dillard Smith]." It was based upon this finding that the Review Commission upheld the citations and penalties against Dillard Smith for items 3 - 6.

Dillard Smith then filed its second petition for judicial review in this matter in which it challenged all six violations found by the Review Commission. Following a hearing, the Chancellor held that the Commission's finding that the foreman of Dillard Smith's two-man crew, Jones, knew when he drove away from pole Z-78R2 that it had not been determined whether the lines on that pole were de-energized and that Jones further knew that Cameron would begin work before Jones returned. As for the Review Commission's finding that Dillard Smith violated the regulation that required a job briefing, the Chancellor found the regulation only required a daily briefing, unless the job posed a different or unique hazard, and that the work to be done at pole Z-78R2 did not pose a different or unique hazard; thus, the Chancellor held that Dillard Smith had not violated the job briefing regulation. The Chancellor affirmed the Commission's finding that Dillard Smith violated the other four items for which it had been cited. Thus, the trial court affirmed the citation for five of the six items. This appeal by both parties followed.

Dillard Smith raises two issues on appeal. First, it contends that the finding that it failed to determine the existing conditions before Cameron commenced work is not supported by substantial and material evidence. Second, Dillard Smith asserts the trial court erred in affirming the violations for items 3 - 6 because the Review Commission's finding that it violated those items was based upon the fact it had violated the job briefing requirement, which the Chancellor held it did not violate. Thus, Dillard Smith contends, there is not substantial and material evidence to support a finding that it violated those regulations.

STANDARD OF REVIEW

Judicial review of a commission's decision is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h) rather than the broad standard of review used in other civil appeals. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279-80 (Tenn. Ct. App. 1988). A court will modify or reverse the decision of the commission if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) (A) Unsupported by evidence which is both substantial and material in the light of the entire record.
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

In reviewing a commission's decision, the court must engage in a three-step analysis. First, the court must determine whether the agency identified the appropriate legal principles applicable to the case. *McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 820 (Tenn. Ct. App. 2005). Second, the court must examine the commission's factual findings to determine whether the findings are supported by substantial and material evidence. *Id*. Finally, the court must examine how the commission applied the law to the facts. *Id*. The final step of this analysis involves mixed questions of law and fact; therefore, the courts must give deference to the commission. *Miller v. Civil Serv. Comm'n*, 271 S.W.3d 659, 665 (Tenn. Ct. App. 2008) (citing *Armstrong v. Metro Nashville Hosp. Auth.*, No. M2004-01361-COA-R3-CV, 2006 WL 1547863, at *2 (Tenn. Ct. App. June 6, 2006) (no Tenn. R. App. P. 11 application filed)). Accordingly, the court must determine whether the commission's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." *Clay County Manor v. State Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993); *Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984).

When we review the decision of the trial court, we are to determine whether the trial court properly applied the standard of review found at Tenn. Code Ann. § 4-5-322(h). *See Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002) (quoting *Papachristou v. Univ. of Tennessee,* 29 S.W.3d 487, 490 (Tenn. Ct. App. 2000)).

ANALYSIS

To establish a violation of TOSHA standards, the Commissioner of Labor and Workforce Development must show by a preponderance of evidence that: "1) the cited standard applies; 2) the standard was not met; 3) employees had access to the violative condition; and 4) the employer had actual knowledge of the violative condition or, with the exercise of due diligence, could have known of the violative condition." *Secretary of Labor v. Caretti, Inc.*, 21 OSHC (BNA) 1214, 2005 WL 628138, at *3 (Mar. 10, 2005) (filed Feb. 7, 2005) (citation omitted). Since the actions of a supervisor are imputed to the employer, a supervisor's actual or constructive knowledge of a violation of TOSHA standards would be imputed to the employer. *Donovan v. Capital City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983).

The TOSHA inspector issued one citation in which he cited Dillard Smith for six serious violations. We will discuss each item in turn.

ITEM 1 – DETERMINING EXISTING CONDITIONS

The TOSHA inspector issued the following citation to Dillard Smith for violating 29 C.F.R. 1910.269(a)(3): "Before work on the lines began, conditions related to the safety of the work, such as the voltage of the line and location of power line circuits, were not determined. "

The regulation at issue, 29 C.F.R. 1910.269(a)(3), reads as follows:

> Existing conditions. *Existing conditions related to the safety of the work to be performed shall be determined before work on or near electric lines or equipment is started*. Such conditions include, but are not limited to, the nominal voltages of lines and equipment, the maximum switching transient voltages, the presence of hazardous induced voltages, the presence and condition of protective grounds and equipment grounding conductors, the condition of poles, environmental conditions relative to safety, and the locations of circuits and equipment, including power and communication lines and fire protective signaling circuits. (Emphasis added).

The Review Commission upheld the citation for violating 29 C.F.R. 1910.269(a)(3) based on the finding that "no one did anything to determine whether or not the power lines at pole Z-78R2 were energized prior to Sam Cameron starting repair work." The Review Commission's ruling was affirmed by the Chancery Court.

Dillard Smith contends there is not substantial and material evidence to support the finding that its employees, particularly its foreman, Mike Jones, failed to check conditions related to the safety of the work, specifically the voltage of the line and location of power line circuits, before work began. This contention is premised on the argument that the foreman (Jones) did not believe Cameron would begin work on pole Z-78R2 until Jones returned, at which time Jones would

ostensibly determine the existing conditions, particularly determine whether the line was energized, before Cameron started to work on pole Z-78R2.

The Review Commission made two findings that pertain directly to this issue; the question then is whether there is substantial and material evidence in the record to support these findings. One of the relevant findings of fact is: "When the crew arrived at pole Z-78R2 to conduct the storm damage repair on the morning of February 19, 2004, they assumed that the line was not energized." The other is:

> Prior to Mike Jones leaving the site to check the tap line, 5th stage apprentice Sam Cameron took his climbing equipment and work tools out of the Dillard Smith truck for the purpose of climbing pole Z-78R2 and commencing the repair work to be done. Although Mike Jones claims that he thought no repair work would begin until he returned from checking the tap line the Review Commission does not find this claim to be credible. The Review Commission believes that Mike Jones knew full well that Sam Cameron and Kyle Gibson had every intention of starting the repair work while he (Mike Jones) checked the tap line; . . . .

When a court is called upon to review an agency's factual determinations to decide whether the agency's factual determinations are supported by "evidence which is both substantial and material in light of the entire record," the court is to uphold the agency's factual determinations if there exists "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Wayne County*, 756 S.W.2d at 279-80 (citing Tenn. Code Ann. § 4-5-322(h)(5); *Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984); *Sweet v. State Technical Inst.*, 617 S.W.2d 158, 161 (Tenn. Ct. App. 1981)). What amounts to substantial evidence is not defined but "in general terms, it requires something less than a preponderance of the evidence . . . , but more than a scintilla or glimmer. . . . Substantial evidence is not limited to direct evidence but may also include circumstantial evidence or the inferences reasonably drawn from direct evidence." *Id*. at 280 (citations omitted). "Resolving conflicting evidence is for the agency." *Id*. at 281. In determining the substantiality of evidence, the courts take into account whatever in the record fairly detracts from its weight, but we may not substitute our judgment for that of the agency as to the weight of the evidence on questions of fact. Tenn. Code Ann. § 4-5-322(i).

The Review Commission made a significant factual determination when it found that "[o]n all points pertinent to this decision, the testimony of Powell Valley Electric Cooperative Lineman Kyle Gibson is credited over the testimony of Dillard Smith's Foreman, Mike Jones." It also made the significant factual determination that Jones's testimony that he believed no work would start until he returned was not credible. This determination is supported by the fact that Jones drove Cameron to the location of pole Z-78R2, stopped to let Cameron out of his truck, where Gibson and other workers were waiting, at which time Gibson asked Jones to drive up a driveway that was near pole Z-78R2 to make sure that no trees or tree limbs were on a residential tap line that came off of that pole, and Jones then drove off. The credibility finding by the Commission is supported by the fact

that Cameron removed his climbing equipment and tools from Jones's truck prior to Jones leaving pole Z-78R2. It is further supported by the testimony of Gibson that Cameron told Jones immediately prior to Jones driving away that "I got this one," referring to pole Z-78R2. We also find it very significant that when Jones returned, he saw Cameron working on the pole for at least thirty seconds and that he did not tell Cameron to stop work until the conditions could be determined; instead Jones responded to Gibson's request to get some equipment to help Cameron work on the pole. In fact, Jones was handing the equipment to Gibson prior to and when Cameron was electrocuted.

As we stated earlier, one of the facts needed to establish a violation of TOSHA standard is that the employer had actual knowledge of the violative condition or, *with the exercise of due diligence, could have known of the violative condition*. *Caretti, Inc.*, 2005 WL 628138, at *3 (emphasis added). All Jones had to do to assure work did not begin until the conditions were determined was to tell Cameron to not start work on pole Z-78R2 until Jones returned; he did not. Instead, Jones relied upon a mere belief that Cameron would not work on the pole until he returned.

The courts of this state are to uphold the agency's factual determinations if there exists "such relevant evidence as a reasonable mind might accept to support a rational conclusion . . . ." *Wayne County*, 756 S.W.2d at 279-80 (citing Tenn. Code Ann. § 4-5-322(h)(5)). Moreover, we give great deference to an agency's credibility determinations because they are in the best position to evaluate and weigh the credibility of the witnesses. *Hayes v. Metropolitan Gov't of Nashville & Davidson County*, No. 01-A-019108 CH 00291, 1992 WL 40194, at *9 (Tenn. Ct. App. Mar. 4, 1992). The Review Commission was in the best position to make a credibility determination and then to conclude that "Jones knew full well that [Cameron and Gibson] had every intention of starting the repair work while he . . . checked the tap line."

We have therefore concluded that there was substantial and material evidence to uphold the finding that Dillard Smith violated 29 C.F.R. 1910.269(a)(3).

ITEM 2 – JOB BRIEFING

The second citation issued by the TOSHA inspector pertained to 29 C.F.R. 1910.269(c)(1). The citation read: "A job briefing was not conducted before the work began at pole No. Z-78R2."

Regulation 29 C.F.R. 1910.269(c)(1) reads as follows:

> (c) Job briefing. The employer shall ensure that the employee in charge conducts a job briefing with the employees involved before they start each job. The briefing shall cover at least the following subjects: hazards associated with the job, work procedures involved, special precautions, energy source controls, and personal protective equipment requirements.
>
> > (1) Number of briefings. *If the work or operations to be performed during the work day or shift are repetitive and similar, at least one*

> *job briefing shall be conducted before the start of the first job of each day or shift*. Additional job briefings shall be held if significant changes, which might affect the safety of the employees, occur during the course of the work. (Emphasis added).

The Review Commission held that Dillard Smith violated 29 C.F.R. 1910.269(c)(1) because its foreman, Mike Jones, failed to conduct a job briefing at pole Z-78R2. The Chancellor reversed that finding based upon the determination that the regulation only required one job briefing at the beginning of the day/shift, that a second or subsequent job during that shift was not required unless the work posed a different or unique hazard, and that the record did not support a finding that the work at pole Z-78R2 was unique or even different; therefore, Dillard Smith was not required to conduct an additional job briefing at pole Z-78R2. The Commissioner asserts that the trial court erred by reversing the Review Commission on this issue.[6]

The regulation requires that "[t]he employer ensure that the employee in charge conducts a job briefing with the employees involved before they start each job," however, the regulation also provides that only one briefing at the start of the first job of each day or shift is required if the work on that day or shift is "repetitive and similar" unless there are "significant changes, which might affect the safety of the employees, occur during the course of the work." 29 C.F.R. 1910.269(c)(1). There is no evidence in the record to suggest that the work to be done at pole Z-78R2 was significantly different from the work done earlier in the shift, and there is no evidence that working on that pole posed a unique hazard. Therefore, we find that while Jones was not required to do a specific job briefing at pole Z-78R2; all that was required was a daily briefing at the beginning of the day or shift. We, therefore, find that the Commission applied an erroneous legal standard in its determination that Dillard Smith violated the job briefing regulation.

We have determined that the TOSHA regulations only required that Dillard Smith (Mike Jones) provide a job briefing at the beginning of the day or shift on February 19, 2004.[7] Accordingly,

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[6] Dillard Smith asserts in their reply brief that the Commissioner failed to assert this argument in a cross-appeal; therefore, this Court may not consider this argument. Dillard Smith misconstrues the rule. The Tennessee Rules of Appellate Procedure provide:

> Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required. Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court.

Tenn. R. App. Proc. 13(a). Dillard Smith cites several cases that support their theory regarding cross-appeals; however, those cases are federal and clearly not in line with current appellate procedure in Tennessee. Therefore, this Court can and will review the decision of the trial court to overturn the decision of the Review Commission as it pertained to the job briefing requirement.

[7] By failing to conduct a job briefing at pole Z-78R2, Jones violated Dillard Smith's company policy, which required the crew to do an assessment followed by a job briefing at each site; however, TOSHA's regulation differs in (continued...)

we will examine the record to ascertain whether Dillard Smith/Mike Jones provided the type of job briefing TOSHA required at the beginning of the shift on February 19, 2004. The regulation provides that the daily briefing must cover the following topics: "hazards associated with the job, work procedures involved, special precautions, energy source controls, and personal protective requirements." 29 C.F.R. 1910.269(c).

Although the Commission expressly stated that the violation was based on Jones's failure to provide a job briefing "at pole Z-78R2," it is significant that the Review Commission also made the finding that "Jones never conducted the kind of job briefing contemplated by the cited standard during the time they were doing this storm damage work." We understand this to mean that Jones never provided a job briefing that satisfied the requirement of the standard at any time during the week of February 14, 2004.

It is undisputed that Jones did not conduct a job briefing at pole Z-78R2, however, Jones testified that he conducted job briefings every day. The Review Commission discredited Jones's testimony, though. Moreover, no witness corroborated Jones's assertion that he conducted any briefings.

Gibson testified that Jones and Cameron were often alone together, during which time Jones may have provided a job briefing to Cameron. Conversely, Gibson also testified that there were times during the week when he (Gibson) was present that it would have been appropriate for Jones to discuss hazards associated with a job yet no briefings ever took place, at least not in his presence. Another witness, Charles Marsee, an employee of Wolf Tree Service who rode with Cameron and Jones throughout that week, testified that he did not hear Jones conduct a job briefing the morning of the accident. Marsee also testified that he never witnessed Jones give a job briefing at any time that week. Ray Dillman, an employee of Wolf Tree Service who rode with Gibson throughout the week, stated that he did not recall any safety briefings that week. Dillman further explained that while he did not observe all of Jones and Cameron's interactions, when the crew did talk the only statements pertaining to safety that he witnessed were "be careful" or "be careful, do your thing."

The courts of this state are to uphold the agency's factual determinations if there exists "such relevant evidence as a reasonable mind might accept to support a rational conclusion. . . ." *See Wayne County*, 756 S.W.2d at 279-80 (citing Tenn. Code Ann. § 4-5-322(h)(5)). Moreover, we must give great deference to the Review Commission's decision to discredit Jones's testimony because the Commission was in the best position to evaluate and weigh his credibility, *see Hayes*, 1992 WL 40194, at *9. Moreover, we find it significant that there is no evidence in the record to corroborate Jones's testimony concerning job briefings. To the contrary, there is substantial and material evidence to support the Review Commission's finding that Jones did not conduct a job briefing at anytime on the day of Sam Cameron's death. We, therefore, reverse the decision of the Chancellor concerning Item 2 and remand for entry of a judgment affirming the Review Commission's finding

[7](...continued)
a material way.

that Dillard Smith violated 29 C.F.R. 1910.269(c)(1) by failing to provide a job briefing on February 19, 2004.

ITEM 3 – TOO CLOSE TO AN EXPOSED ENERGIZED PART

The third item for which the TOSHA inspector issued a citation was for violating 29 C.F.R. 1910.269(l)(2). The citation read: "An employee approached and/or took a conductive object too close to an exposed energized part."

Regulation 29 C.F.R. 1910.269(l)(2) reads as follows:

> (l) Working on or near exposed energized parts. This paragraph applies to work on exposed live parts, or near enough to them, to expose the employee to any hazard they present.
>
> > (2) Minimum approach distances. *The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10, unless*:
> >
> > > (i) The employee is insulated from the energized part (insulating gloves or insulating gloves and sleeves worn in accordance with paragraph (l)(3) of this section are considered insulation of the employee only with regard to the energized part upon which work is being performed), or
> > >
> > > (ii) The energized part is insulated from the employee and from any other conductive object at a different potential, or
> > >
> > > (iii) The employee is insulated from any other exposed conductive object, as during live-line bare-hand work.

The Review Commission held that Dillard Smith violated 29 C.F.R. 1910.269(l)(2) because Jones "did not conduct nor intend to conduct a job briefing prior to Sam Cameron performing the repair work" and "[i]t appears that Jones never conducted the kind of job briefing contemplated by the cited standard during the time they were doing this storm damage work." The Chancery Court held that despite its decision to reverse the Review Commission's finding that Dillard Smith failed to satisfy the job briefing requirement, there was substantial and material evidence to support the Review Commission's finding that Dillard Smith was responsible for allowing an employee to come into contact with an energized part, in direct violation of 29 C.F.R. 1910.269(l)(2). Primarily, the

Chancery Court relied on the fact that "Jones knew work was to begin immediately in his absence," and by failing to ensure that proper safety precautions were taken before he left, Jones was responsible for the violations that took place in his absence.

Dillard Smith argues that the trial court erred in upholding citation items 3 - 6 on grounds not relied upon by the Review Commission. Dillard Smith contends that the Review Commission's sole basis for imputing knowledge of the violative conduct that the employee engaged in was based on the fact that Jones failed to do the job briefing despite knowing that Cameron would climb the pole and start working on the downed power lines before he returned to the job-site. Dillard Smith contends that by reversing the Review Commission on the issue of the job briefing, the trial court could not have upheld the citation for items 3 - 6 because "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery*, 318 U.S. 80, 87 (1943).

We find Dillard Smith's reliance on *Chenery* is misplaced. In that case, which involved the review of a Securities and Exchange Commission (SEC) decision, the SEC relied on what it termed "the broad equitable principles" set forth in certain court decisions. *Id.* at 88. The Supreme Court held that the validity of SEC's ruling must be judged on that basis, as well, and further opined that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id. Chenery* stands for the proposition that reviewing courts are only allowed to review the administrative agency's statutory interpretations, not their power to act. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 357-59 (6th Cir. 2007) (Rogers, J., concurring); 33 Charles Alan Wright & Charles H. Koch, Jr., Fed. Prac. & Proc. § 8379 (3d ed. 2009). That is not the case here. The issue before this court is whether the facts upon which the Review Commission imputed knowledge to the employer was harmless error; in other words, can the Chancery Court and this court review the Commission's factual findings to determine whether there is another or different legal basis for imputing knowledge to Dillard Smith. In Tennessee, the reviewing court may rely on the administrative agency's factual findings in providing substantial and material evidence to support the agency's decision, so long as the essential ruling of the agency, the Review Commission, is not disturbed. *See Bishop v. Tenn. State Bd. of Accountancy,* 905 S.W.2d 939, 942 (Tenn. Ct. App. 1995). This is the case even if errors are found. *Id*. Thus, the reviewing court may examine whether there are other factual findings in the record that would support the Review Commission's decision as to items 3-6.

We reversed the Chancery Court's decision on the issue of Item 2, which may render the above argument moot; nevertheless, we are in agreement with the Chancellor's finding that Dillard Smith's violation of Item 1 – failing to determine the existing conditions related to the safety of the work to be performed before work on or near electric lines or equipment is started – is sufficient to establish that Dillard Smith was in violation of Items 3 - 6.

In addition to the above assertion, Dillard Smith also presents the affirmative defense that Sam Cameron's conduct constituted employee misconduct. The Review Commission disagreed and so do we. The Commission found that:

> Cameron had no expectation of being disciplined for starting the job without a job briefing or for any of the other violations. Everyone thought the power line was dead so it did not matter if the line had been tested or the cutout switch opened or grounds installed or rubber gloves worn, so everyone thought. *It is apparent from the testimony of the foreman, Mike Jones, that even if Cameron had successfully completed this repair without being electrocuted that Jones would not have disciplined Cameron for violating the safety rules and OSHA standards. The lack of effective enforcement of safety rules through effective employee sanctioning, at least in the case of Mike Jones's crew, further undermines [Dillard Smith's] employee misconduct defense*. (Emphasis added).

According to 29 C.F.R. 1910.269(l)(2), Dillard Smith, through its foreman Jones, was required to ensure that Cameron maintain a minimum distance from an energized pole unless he had proper safety equipment protecting him from the energized line. It is undisputed that no one checked the pole to determine whether it was energized before Jones left, and it is also undisputed that Cameron was not wearing the proper protective equipment while working on the pole. Regardless of whether Jones assumed the pole was not energized, Jones had an affirmative duty to *ensure*, as 29 C.F.R. 1910.269(l)(2) mandates, "that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10, unless (i) [t]he employee is insulated from the energized part . . . , (ii) [o]r the energized part is insulated from the employee and from any other conductive object at a different potential, (iii) [o]r the employee is insulated from any other exposed conductive object, as during live-line bare-hand work." Jones, and thus Dillard Smith, failed to ensure that the mandate in 29 C.F.R. 1910.269(l)(2) was done. The Review Commission found, and the Chancery Court and this court have affirmed the finding that Dillard Smith violated 29 C.F.R. 1910.269(a)(3) because Jones failed to determine, before work on pole Z-78R2 began, the conditions related to the safety of the work, such as the voltage of the line and location of power line circuits. By failing to make these determinations and permitting Cameron to begin work prior to such determinations, Dillard Smith failed to *ensure* that Cameron not approach or take any conductive object closer to exposed energized parts than permitted under 29 C.F.R. 1910.269(l)(2). We, therefore, find that there is substantial and material evidence to find that Dillard Smith violated 29 C.F.R. 1910.269(l)(2), which the Review Commission and the Chancery Court upheld.

ITEM 4 – FAILURE TO OPEN THE CUT-OUT

The fourth item for which the TOSHA inspector issued a citation was for violating 29 C.F.R. 1910.269(m)(3)(ii). The citation read: "The cut-off for pole No. Z-78R2 was not opened."

Regulation 29 C.F.R. 1910.269(m)(3) reads in pertinent part:

(m) Deenergizing lines and equipment for employee protection –

(1) Application. Paragraph (m) of this section applies to the deenergizing of transmission and distribution lines and equipment for the purpose of protecting employees. Control of hazardous energy sources used in the generation of electric energy is covered in paragraph (d) of this section. Conductors and parts of electric equipment that have been deenergized under procedures other than those required by paragraph (d) or (m) of this section, as applicable, shall be treated as energized.

* * *

(3) Deenergizing lines and equipment.

(i) *A designated employee shall make a request of the system operator to have the particular section of line or equipment deenergized. The designated employee becomes the employee in charge (as this term is used in paragraph (m)(3) of this section) and is responsible for the clearance*.

(ii) *All switches, disconnectors, jumpers, taps, and other means through which known sources of electric energy may be supplied to the particular lines and equipment to be deenergized shall be opened. Such means [sic] shall be rendered inoperable, unless its design does not so permit, and tagged to indicate that employees are at work*.

(iii) Automatically and remotely controlled switches that could cause the opened disconnecting means to close shall also be tagged at the point of control. The automatic or remote control feature shall be rendered inoperable, unless its design does not so permit.

(iv) Tags shall prohibit operation of the disconnecting means and shall indicate that employees are at work.

(v) After the applicable requirements in paragraphs (m)(3)(i) through (m)(3)(iv) of this section have been followed and the employee in charge of the work has been given a clearance by the system operator, the lines and equipment to be worked shall be tested to ensure that they are deenergized.

(vi) Protective grounds shall be installed as required by paragraph (n) of this section.

29 C.F.R. 1910.269(m)(3)(i) - (vi) (emphasis added). The Review Commission determined that Dillard Smith violated this regulation. The Chancellor affirmed the Commission's ruling, *albeit* on different grounds than that found by the Commission.

Gibson testified that Pole Z-78R2 was a single-shot cut-out, which he described as the type of cut-out that has a spring that releases if there is a fault current or a rise of amps. He further explained it is similar to the switches found in residential fuse boxes. It is undisputed that the cut-off for pole No. Z-78R2 was not opened. Thus, there was a violation of 29 C.F.R. 1910.269(m)(3)(ii).[8] As discussed earlier, whether Dillard Smith violated this regulation is dependent upon whether it had actual knowledge of the violative condition or, *with the exercise of due diligence, could have known of the violative condition*. *See Caretti, Inc.*, 2005 WL 628138, at *3 (emphasis added).

The Review Commission held, *inter alia*, that Dillard Smith's safety program was not effective in practice and which the Commission found relevant to the issue of whether Cameron would likely follow the applicable safety procedures or proceed without doing so in order to get the work done as soon as possible. This finding directly pertains to whether Dillard Smith, with the exercise of due diligence, *could have known of the violative condition*. In this case, the reasonable care Dillard Smith needed to exercise was the effective enforcement of safety procedures.

We must give great deference to the Commission's finding that Dillard Smith's safety program was not effective in practice. *See Wayne County*, 756 S.W.2d at 279-80 (citing Tenn. Code Ann. § 4-5-322(h)(5)). Based upon the foregoing findings by the Commission, we have concluded that these findings as well as the finding that Dillard Smith violated 29 C.F.R. 1910.269(a)(3), by failing to determine the existing conditions related to the safety of the work to be performed before work on or near electric lines or equipment was started, provide the requisite substantial and material evidence needed to hold that Dillard Smith violated 29 C.F.R. 1910.269(m)(3)(ii). We, therefore, affirm the Review Commission's finding that Dillard Smith violated 29 C.F.R. 1910.269(m)(3)(ii).

ITEM 5 – FAILURE TO TEST THE LINE

The fifth item for which the TOSHA inspector issued a citation was for violating 29 C.F.R. 1910.269(m)(3)(v). The citation reads: "The line for pole No. Z-78R2 was not tested to ensure [sic] it was de-energized." The Review Commission held that Dillard Smith violated this regulation. The Chancellor affirmed the Commission's ruling. We find substantial and material evidence in the record to support the ruling.

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[8]Paragraph (m)(3) also mandates that there be "a designated employee," for purposes of that section, who has the affirmative responsibility to make a request of the system operator to have the particular section of line or equipment deenergized. As Dillard Smith's foreman, Jones was the designated employee in the absence of proof that he appointed someone else. There is no evidence to support a finding that Jones assigned such responsibility to anyone; thus, Jones was the designated employee of Dillard Smith for purposes paragraph (m)(3). Therefore, the duty fell upon Jones to ensure Dillard Smith complied with 29 C.F.R. 1910.269(m)(3).

29 C.F.R. 1910.269(m)(3)(v) is quoted in the immediate preceeding section. For clarity, we will restate the specific section Dillard Smith was found to have violated. provides, in pertinent part:

> (m) Deenergizing lines and equipment for employee protection –
>
> * * *
>
> (3) Deenergizing lines and equipment.
>
> * * *
>
> (v) *After the applicable requirements in paragraphs (m)(3)(i) through (m)(3)(iv) of this section have been followed and the employee in charge of the work has been given a clearance by the system operator, the lines and equipment to be worked shall be tested to ensure that they are deenergized*. (Emphasis added).

The record reveals that electrical contractors, and their employees, are to use a device known as a "tick tracer" to test electrical lines to determine if there is voltage in the line before beginning work on the line. Jones and Cameron were well aware of how to use the tick tracer, in fact each of them had used the device earlier in the week. Gibson, however, testified that Cameron did not have a tick tracer when he exited Jones's vehicle or when he climbed pole Z-78R2 to begin work. Nevertheless, Cameron began work on the lines without testing to ensure the lines were deenergized; thus, the regulation was violated. As was the case with Item 4 above, there is a dispute of fact concerning whether this violation was the result of employee misconduct or Jones's failure, and thus Dillard Smith's failure to ensure the regulation was followed. The Review Commission held that Dillard Smith's safety program was not effective in practice, that Jones knew that Cameron would be working on the electrical line before he returned to pole Z-78R2, and that Jones failed to ensure that the line was or would be tested before Cameron started work on that line.

As previously stated, we must determine whether there is substantial and material evidence to support a finding that Dillard Smith had actual knowledge of the violative condition or, with the exercise of due diligence, could have known of the violative condition. *Caretti, Inc.*, 2005 WL 628138, at *3. The Review Commission made the significant finding of fact that Dillard Smith's safety program was not effective in practice, and we give great deference to this finding. *See Wayne County*, 756 S.W.2d at 279-80 (citing Tenn. Code Ann. § 4-5-322(h)(5)). The Review Commission also found that "Jones knew full well that [Cameron and Gibson] had every intention of starting the repair work while he . . . checked the tap line." These findings and the fact Dillard Smith was found to have violated 29 C.F.R. 1910.269(a)(3), by failing to determined the existing conditions related to the safety of the work to be performed before work on or near electric lines or equipment was started, provide the requisite substantial and material evidence needed to hold that Dillard Smith violated 29 C.F.R. 1910.269(m)(3)(v). We, therefore, affirm the Review Commission's finding that Dillard Smith violated 29 C.F.R. 1910.269(m)(3)(v).

ITEM 6 – FAILURE TO GROUND THE LINE

The sixth item for which the TOSHA inspector issued a citation was for violating 29 C.F.R. 1910.269(m)(3)(vi) (referenced above). The citation read: "The line for pole No. Z-78R2 was not grounded." The Review Commission and the Chancery Court upheld this violation based on the same reasons as set out in Item 3 above.

The regulation provides that "Protective grounds shall be installed as required by paragraph (n) of this section." 29 C.F.R. 1910.269(m)(3)(vi). The following subsection provides: "After the applicable requirements of paragraphs (m)(3)(i) through (m)(3)(vi) of this section have been followed, the lines and equipment involved may be worked as deenergized." 29 C.F.R. 1910.269(m)(3)(vii).

Had Dillard Smith effectively enforced its safety program it would be reasonable for the trier of fact to believe that Cameron would have followed the proper safety procedures including providing protective grounds and if he did not it would constitute employee misconduct. However, the Review Commission held that Dillard Smith's safety program was not effective in practice. For this reason and the additional reasons discussed in detail above, we find there is substantial and material evidence to support the Commission's determination that Dillard Smith violated 29 C.F.R. 1910.269(m)(3)(vi).

IN CONCLUSION

The evidence clearly and convincingly supports the Review Commission ruling that Dillard Smith violated all six items set forth in the citation. The Chancellor affirmed all but one of the violations found by the Review Commission. We, therefore, respectfully reverse the Chancellor's ruling that Dillard Smith did not violate the job briefing requirements in 29 C.F.R. 1910.269(c)(1) (Item 2), and we affirm the Chancellor in all other respects.

Costs of appeal are assessed against Dillard Smith Construction Company.

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FRANK G. CLEMENT, JR., JUDGE